

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID CLAYTON,	§ No. 396, 2005
	§
Defendant Below,	§
Appellant,	§
	§ Court Below – Superior Court
v.	§ of the State of Delaware,
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. I.D. No. 0407008182
	§
Plaintiff Below,	§
Appellee.	§

Submitted: January 11, 2006

Decided: January 17, 2006

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

O R D E R

This 17th day of January 2006, it appears to the Court that:

(1) The defendant-appellant, David Clayton (“Clayton”) appeals from his convictions, following a jury trial, on three counts of Robbery in the First Degree, three counts of Kidnapping in the Second Degree, six counts of Possession of a Firearm During the Commission of a Felony, and Possession of a Firearm by a Person Prohibited. The sole argument raised by Clayton in the direct appeal is that the trial court erred when it denied his motion to suppress an in-court identification. According to Clayton, that in-court identification was improperly influenced by an impermissibly suggestive out-of-court photographic identification. We conclude that the photographic identification was not

suggestive, and that the trial court properly denied the motion to suppress. Accordingly, we affirm the judgments of the Superior Court.

(2) On April 1, 2004 at approximately 11:00 p.m., a McDonald's Restaurant was robbed at gunpoint. After ordering a cheeseburger, an unmasked male assailant drew a gun, and directed the assistant manager, Crystale Diaz ("Diaz"), to lie on the floor. The unmarked robber then came around the counter and ordered her to stand up, and forced Diaz and two other employees into the walk-in refrigerator at gunpoint. The robber took Diaz to the office where she opened the safe and he took the money that was in it. The robber then ordered Diaz back into the refrigerator. After several minutes the employees exited the refrigerator and called the police.

(3) Diaz described the robber to the police as a young black male. She specifically mentioned that he had marks or decay on his teeth. The robbery was recorded on an in-store surveillance camera. The videotape of the robbery showed a black male in his 20's wearing a hooded black jacket. After publicizing still photographs from the footage, the police received several anonymous tips identifying Clayton as the perpetrator.

(4) Three months after the incident, Diaz provided an identification of Clayton from a photographic line-up. In this appeal, it is the alleged impropriety of this evidence that Clayton relies on to support his challenge to the in-court

identification. The photographic line-up included Clayton and five other men. Although Clayton is the only one with his mouth partially open, his teeth are only minimally visible, and the photograph does not show either his braces or possible decay. After two minutes, Diaz identified Clayton and stated that he looked like the robber. Diaz subsequently identified Clayton in open court and declared that he was the robber.

(5) In this appeal, Clayton claims that the pre-trial photographic array was impermissibly suggestive and resulted in an unreliable in-court identification. “An identification procedure will not pass constitutional muster where it is ‘so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.’”¹ When a trial judge considers whether an identification procedure is impermissible, it must determine: first, whether the procedure was unnecessarily suggestive; and second, whether there was a likelihood of a misidentification.² For the second determination, this Court has adopted the factors set forth by the United States Supreme Court when considering whether an identification may be improper. A judge must consider:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [the witness'] prior description of the criminal, the level of certainty demonstrated

¹ *Richardson v. State*, 673 A.2d 144, 147 (Del. 1996) (quoting *Simmons v. U.S.*, 390 U.S. 377, 384 (1968)).

² *Id.*

[by the witness] at the confrontation, and the length of time between the crime and the confrontation.³

(6) Clayton contends that the pretrial photo identification was impermissibly suggestive for two reasons. First, because Diaz had mentioned decaying or teeth with marks several times to the police, Clayton claims that the photographic array in which he was the only one shown with his mouth partially open was impermissibly suggestive because Diaz would be naturally inclined to focus on the photograph with teeth showing. Second, Clayton maintains that placing his photograph first in the line-up was impermissibly suggestive because a witness would be drawn to the first photograph.

(7) The trial judge correctly concluded that neither contention establishes Clayton's claim that the photographic line-up was impermissibly suggestive. The picture of Clayton used in the photographic array could not be perceived as a picture of someone with marked or decaying teeth because the teeth were minimally visible.⁴ Second, the placement of the photograph as number one within the array was done at random by a computer. There is no evidence to support Clayton's contention that the placement of his picture in the photographic array was impermissibly suggestive.

³ *Id.* at 148 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)).

⁴ The fact that Clayton did not have marked or decaying teeth, but wore orthodontics was an issue of fact for the jury to weigh in evaluating the credibility of Diaz's identification of Clayton.

(8) The trial judge also correctly evaluated each of the five issues to be considered, as set forth in *Brathwaite*,⁵ before concluding that the circumstances of the photo identification did not lead to a likelihood of a misidentification at trial. First, Diaz had time to view the robber in a well-lit, empty restaurant for several minutes, at first in the relaxed state of normal business, and then in the stressful situation of a robbery. Although the robber was wearing a hood; as revealed by the security camera, the hood did not obstruct Diaz' view of the robber's face. Thus, there was a good opportunity for Diaz to observe the suspect.

(9) Second, Diaz' degree of attention was high because she was focused only on Clayton at the time, as the restaurant was empty. Third, Diaz described the robber as having marked or decaying teeth, when in fact he had orthodontics, does not render the identification unreliable. The inconsistency is minor and Diaz's description was otherwise accurate.⁶

(10) Fourth, Diaz was positive in her identification of Clayton as the robber. She identified him quickly, initially pointing him out within a minute of seeing the photos, and then conclusively stating he looked like the robber within two minutes. Further, the police officer who administered the photographic line-

⁵ *Mason v. Brathwaite*, 432 U.S. 98, 114 (1977).

⁶ See *U.S. v. Burbridge*, 252 F.3d 775, 781 (5th Cir. 2001) (identification found reliable because despite minor inconsistencies, the major aspects of the appearance were consistent); *c.f. U.S. v. Emanuele*, 51 F.3d 1123, 1131 (3d. Cir. 1995) (identification found unreliable because the witness could not identify the defendant in a photo); *Cossel v. Miller*, 229 F.3d 649, 655-56 (7th Cir. 2000) (identification found unreliable because witness described suspect as no taller than 6' and 140 pounds, and defendant was 6'3" and 215 pounds at the time of the crime).

up testified that Diaz was certain in her manner and tone of voice when she identified Clayton as the robber.⁷ Finally, under the totality of the circumstances, the three-month hiatus between the commission of the crime and the photographic line-up is not sufficient to render the identification unreliable and inadmissible *per se* but was another factor for the jury to consider in assessing the credibility of Diaz's identification of Clayton.⁸

(11) The record supports the trial judge's determination that the pre-trial photo identification of Clayton was reliable and did not improperly influence the in-court identification of Clayton by Diaz. Accordingly, the trial judge properly denied Clayton's motion to suppress.

Now, therefore, it is ordered, that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice

⁷ *U. S. v. Emanuele*, 51 F. 3d at 1131 (slight qualifications do not render the identification unreliable).

⁸ *Levasseur v. Pepe*, 70 F.3d 187, 195 (1st Cir. 1995 (identification after 6 months reliable); *see also Neil v. Biggers*, 409 U.S. 188, 201 (1972) (finding the 7 month lapse of time between the crime and the identification troublesome, but okay because the witness did not make any previous identifications and there was no evidence of suggestiveness).